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IN THE

Supreme Court of the United States

SPRING TERM, 1985

NO. _____

GLEN ADKINS and TOM ADKINS,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

QUESTION NUMBER ONE

Whether the Court of Appeals erred in determining that Government's Exhibit 6EE, a Dun and Bradstreet Report regarding Petitioners' alleged company in a mail fraud prosecution was *not* hearsay within the meaning of the Federal Rules of Evidence, Rule 801 because the exhibit was introduced for the purpose of showing "falsity of matters asserted therein" without a determination or proof that Petitioner's or their agents provided the information contained in Exhibit 6EE, thereby abrogating Petitioners' right to confrontation and violating the provisions of Federal Rules of Evidence, Rule 401, 402, 801 and 901.

QUESTION NUMBER TWO

Do Federal Rules of Evidence, Rules 801 and 901, require that all documentary evidence, before introduction, be authenticated as to the source and identity of the declarants.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 9, 1984, re-hearing denied November 5, 1984.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ____F.2d____ (1984) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 and Rule 20 of the Rules of The Supreme Court. An extension of time to file an application for writ of certiorari was granted to include January 25, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, Rule 401 of the Federal Rules of Evidence, Rule 402 of the Federal Rules of Evidence, Rule 801 of the Federal Rules of Evidence, Rule 901 of the Federal Rules of Evidence, as set out in Appendix B.

STATEMENT OF THE CASE

Petitioners, TOM ADKINS and GLEN ADKINS, were charged in a twelve count indictment for violations of the provisions of 18 U.S.C. Sec. 1341 and 18 U.S.C. Sec. 2, by devising a scheme and artifice to defraud and obtain money and property by means of false and fraudulent pretenses, representations and promises from companies throughout the United States engaged in the business of purchasing and leasing heavy industrial and commercial equipment. Simply stated, the Government alleged that Petitioners Adkins' owned and operated a California company, Southwestern Manufacturing and Equipment Company, which allegedly sold non-existent or altered equipment to leasing companies which expected to lease the equipment to a company, Powerguard, Inc., which was allegedly controlled by Walter Cannon, a co-defend-

ant. The Government alleged that Southwestern Manufacturing and Equipment Company altered its serial numbers and provided representations to the leasing companies that the equipment purchased was new and of a specific type. The Government further alleged that Southwestern Manufacturing and Equipment Company was acting as agents for Powerguard, Inc., and that Petitioner, Glen Adkins, acted in all transactions under the pseudonym, ALLEN PERLMAN.

Appellants pled not guilty before a jury which found them guilty of nine counts of mail fraud. At the time of Appellant's Motion for New Trial, the District Court granted judgments of acquittal as to four counts of mail fraud.

During the Governments' direct case, the Government attempted to prove that Petitioners, GLEN ADKINS and TOM ADKINS, furnished fraudulent information to Dun and Bradstreet which, in turn, provided financial reports to the victim leasing companies. The Dun and Bradstreet report pertaining to Southwestern Manufacturing and Equipment Company, Government Exhibit 6EE, was introduced into evidence as part of the business records of Misco Leasing Company. John Payton, representing Misco Leasing Company, identified Governments Exhibit 6EE as being a Dun and Bradstreet report obtained directly from Dun and Bradstreet on February 18, 1981, regarding Southwestern Manufacturing and Equipment Company. *The exhibit was admitted into evidence without any evidence from Dun and Bradstreet as to the source of the information. The Government witness had no knowledge how or from whom Dun and Bradstreet obtained the information. Government's Exhibit 6EE was*

admitted into evidence over Petitioners' objection. Appendix C. As part of its case-in-chief, the Government presented testimony that all or most of the information contained in Government's Exhibit 6EE was false and was part of the fraudulent conduct of Petitioners. Appendix D. The Government, in its argument, made direct reference to the false information furnished by Petitioners' Adkins to Dun and Bradstreet. In its charge, the District Court defined the offense as including the furnishing of "false documentation to these leasing companies". Appendix E.

REASONS FOR GRANTING THE WRIT

Petitioners assert that the decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with decisions of other Federal Courts of Appeals regarding similar matters, *United States v. Beecroft,* 608 F.2d 752 (9th Cir. 1979) and *United States v. Scott,* 668 F.2d 384 (8th Cir. 1981), in that the Fifth Circuit ruled that a Dun and Bradstreet report is admissible into evidence without any requirement of authentication that the information contained therein is derived from the accused. The Court's decision presents a unique question of federal law interpreting the relationship between the authentication requirements of Federal Rules of Evidence Rule 901 and Federal Rules of Evidence Rule 801 in determining the admissibility of documentary evidence.

a. The Court of Appeals, in a novel interpretation of the Federal Rules of Evidence, held that Government Exhibit 6EE, a Dun and Bradstreet report pertaining to Southwestern Manufacturing and Equipment Company,

was offered as a foundation to ultimately prove that the statements contained in the report were false. Thus, the Court stated, the Dun and Bradstreet report was not offered to prove the truth of the matters asserted therein, but rather to prove the falsity of the statements contained in the report. The Court of Appeals concluded that the reports were not hearsay. See Federal Rules of Evidence, Rule 801, 28 U.S.C.A.

Thereby, the Court of Appeals failed to address the threshold question whether or not Petitioners were denied a fair trial within the meaning of the Fifth Amendment to the United States Constitution. The Government presented no evidence, as noted by the District Court,[1] authenticating the source of the information contained in the Exihibt 6EE as required by Rule 901 of the Federal Rules of Evidence. Rule 901 provides, inter alia:

> the requirements of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponents claim.

The Government's entire case against Petitioners was based upon a theory that Petitioners submitted false and fraudulent information, including Dun and Bradstreet reports, to leasing companies in an attempt to induce them to purchase equipment and lease the equipment to Powerguard, Inc. The Government claimed that the information contained in the Dun and Bradstreet reports was compiled by Petitioners. The trial record reflects that the Government presented no evidence to support its theory.

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1. See Appendix E, page 30a (R. p. 548, lines 8-12).

Petitioners submit that in order to satisfy the Rule 901 authentication requirements for admissibility, the Government had the burden of proving the method and sources used in the preparation of the Dun and Bradstreet report. The opinion of the Fifth Circuit Court of Appeals is in direct conflict with its own decisions in *Missouri Pacific Railroad v. Austin,* 292 F.2d 415 (5th Cir. 1961); *United States v. Blake,* 488 F.2d 101 (5th Cir. 1973); *United States v. Williams,* 661 F.2d 528 (5th Cir. 1980); and *Rosenberg v. Collins,* 624 F.2d 659 (5th Cir. 1979), and with decisions of the 8th and 9th Circuits in *United States v. Scott,* 668 F.2d 384 (8th Cir. 1981); and *United States v. Beecroft,* 608 F.2d 752 (9th Cir. 1979). Without proof of authentication, the Government did not establish a nexus between the allegedly false information contained in the reports and Petitioners. Assuming arguendo that the information in the reports was false, the Government must still prove, prior to its admission into evidence, that the false information in Government's Exhibit 6EE was furnished to Dun and Bradstreet by Petitioners. Without such proof, Government's Exhibit 6EE is irrelevant and its admission denied Petitioners their right to a fair trial.

Rule 402, Federal Rules of Evidence, defines irrelevant evidence as evidence that *does not* tend to make the existence of a consequential fact more or less probable. See Fed. Rules Evid., Rule 401, 28 U.S.C.A. *A consequential fact, in fact the operative fact in the Government's case,* is not that allegedly false information was submitted to Dun and Bradstreet but that the information was submitted by Petitioners. The failure of the Government to connect the submission of the false information to Dun and Bradstreet and the Petitioners renders the

reports irrelevant to the Government's theory that the Petitioners submitted false and fraudulent information to the leasing companies, which induced them to purchase equipment from them. Thereby, Petitioners right to a fair trial was abrogated.

b. Petitioners maintain that the opinion of the Court of Appeals is erroneous in that, within the meaning of Rule 801, Federal Rules of Evidence, the Government's Exhibit 6EE was hearsay. The Court of Appeals concluded that the report was not hearsay because it was offered to prove the falsity of matters asserted. This analysis overlooks the fact that proving the truth or falsity of the matters asserted necessarily entails proof that the matter was asserted by someone. Further, the definition of hearsay applied is incomplete.

> Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

McCormick, *Handbook on the Law of Evidence*, § 246, p. 584 (1972). Hearsay evidence is excluded because there is no manner by which to test the credibility of the out-of-court declarant. Without proving that Petitioners or anyone at their direction caused Exhibit 6EE to be prepared, the document is hearsay. No evidence was presented identifying the source of this information contained in Government's Exhibit 6EE. Thereby, Petitioners were prohibited from examining Dun and Bradstreet as to the source of the information. The inability to test the credibility of the out-of-court asserter by cross-examina-

tion denied Petitioners their right to confrontation as provided by the Sixth Amendment to the United States Constitution. See *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The threshold question is how Dun and Bradstreet obtained the information, whether true or false, which was contained in Government's Exhibit 6EE. The failure of the Government to prove the source of the information, on whose credibility the information rested, whether true or false, constituted a denial of Petitioners' Sixth Amendment right to confront witnesses against him.

The Court of Appeals mechanically adhered to a strict definition of hearsay without addressing the confrontation issue, and overlooked the fact that an out-of-court statement offered to prove the falsity of the matters asserted is just as violative of the constitutional right of confrontation as is an out of court statement offered to prove the truth of the matters asserted therein. Both require proof of the declarant's identity. Consequently, the document must be considered "hearsay" within the meaning of Rule 801, Federal Rules of Evidence and its introduction abrogated Petitioner's Fifth Amendment right to a fair and impartial trial.

CONCLUSION

Petitioner prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Writ of Certiorari has been mailed to Patty Merkamp Stemler, Attorney, Department of Justice, Constitution Avenue and Tenth Street N.W., Washington, D.C. 20236, and James R. Gough, Assistant United States Attorney, Federal Building, 515 Rusk, Houston, Texas 77002, on this the _____ day of January, 1985.

Stanley G. Schneider

STANLEY G. SCHNEIDER

APPENDIX "A"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GLEN ADKINS, a/k/a ALAN PERLMAN,
TOM ADKINS, WALTER CANNON,
RON H. HAWKINS, Defendants-Appellants.

NO. 83-2608

United States Court of Appeals,
Fifth Circuit

September 4, 1984

Defendants were convicted in the United States District Court for the Souhern District of Texas, James DeAnda, J., of several counts of mail fraud, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) while trial court erred in making certain statements in mail fraud trial which could suggest to jury that court believed that defendants "bilked" victims, defendants did not demonstrate that the errors were substantial and that they prejudiced their case; (2) trial court's failure to give a good-faith instruction sua sponte for one defendant did not constitute plain error where it was questionable whether the evidence presented at trial established an evidentiary foundation for the defense; and (3) evidence, which established that defendants were engaged in a scheme to defraud companies involved in financing the

purchase of heavy machinery, was sufficient to support defendants' mail fraud convictions.

Affirmed.

Appeals from the United States District Court for the Southen District of Texas.

Before GEE, POLITZ and RANDALL, Circuit Judges.

GEE, Circuit Judge:

Defendants were found guilty by a jury of several counts of mail fraud in violation of 18 U.S.C. § 1341 (1976). On appeal they claim: (1) the district court erred in admitting a Dun & Bradstreet report and the banking records of Southwestern Manufacturing & Equipment Co.; (2) the conduct of the trial judge denied them a fair trial; (3) the district court erred in failing to give certain requested jury instructions; and (4) the evidence was insufficient to support their convictions. Finding no merit in these contentions, we affirm.

I. *Facts*

Defendants were engaged in a scheme to defraud companies involved in financing the purchase of heavy machinery. These companies lease heavy machinery to companies that cannot afford to purchase it outright or through bank loans. In a typical transaction, the leasing company, upon determining that a lessee is creditworthy, purchases from a vendor machinery needed by the lessee. The vendor then sends equipment directly to the lessee, who notifies the leasing company of the machinery's arrival and condition. At that point, the leasing company

pays the vendor and begins to receive monthly lease payments from the lessee.

Defendants Glen Adkins, Tom Adkins and Walter Cannon owned vendor companies that never actually had any machinery. Cannon, and later defendant Ron Hawkins, owned Powerguard of Texas, Inc., a lessee company that would falsely certify to victim leasing companies that it had received equipment from the phony vendors. After the victims paid Cannon and the Adkins brothers for the machinery, Powerguard defaulted on the lease payments. When the leasing companies attempted to repossess the equipment, they discovered that it had never existed or was worthless.

II. *Admissibility of Dun & Bradstreet Report*

[1] Defendants contest the admission of a Dun & Bradstreet report that described the business of Southwestern Manufacturing & Equipment Co., a spurious lessee company owned by Tom and Glen Adkins. The report listed the names of Southwestern's corporate officers, the number of its employees, the amount of office space and the credit history of the company. Through other testimony, the government demonstrated that most of the information was false. Defendants argue that the report was hearsay and should not have been admitted.

Hearsay is a statement offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801. The Dun & Bradstreet report was not offered, however, to prove the *truth* of the matter asserted that Southwestern's facilities and employees were as reported. Rather, the government offered the report to establish a foundation

for later showing, through other admissible evidence, that it was false. *United States v. McDonnel,* 550 F.2d 1010, 1012 (5th Cir.), *cert. denied,* 434 U.S. 835, 98 S.Ct. 123, 54 L.Ed.2d 96 (1977). When statements are introduced to prove the *falsity* of the matter asserted, they are not inadmissible as hearsay. *Id. Cf. Anderson v. United States,* 417 U.S. 211, 220, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (1974); *United States v. Hershenow,* 680 F.2d 847, 861 n. 12 (1st Cir. 1982); *United States v. Weaver,* 565 F.2d 129, 136 (8th Cir. 1977), *cert. denied,* 434 U.S. 1074, 98 S.Ct. 1263, 55 L.Ed.2d 780 (1978). Thus, the Dun & Bradstreet report is not hearsay and was properly admitted.

III. *Admission of Southwestern's Banking Records*

[2] Defendants next assert that the trial court should, as a sanction against the government for violating discovery rules, have refused to admit the banking records of Southwestern. Defendants have not shown, however, that the government violated any discovery rule.

Defendants admit that, prior to trial, the prosecutor informed them that he had the bank records and that they were available for inspection. The prosecutor also told defendants that as of that time he did not intend to offer the records in evidence.

On the third day of trial, the government informed defense counsel that it had reconsidered and would introduce the records. The prosecutor then provided defense counsel with copies of the records. The next day the court admitted the records, but stated that defendants' counsel could defer cross-examining Special Agent Jim

Burkett, who was to testify as to the contents of the records, for four days in order to permit them to familiarize themselves with the records' contents.

Defendants argue that they were denied a fair trial because the government lied to them about the records and because the records were incomplete. The government did not lie; the prosecution truthfully told defendants it did not intend to introduce the records *at that time*. Defendants were given four days to re-examine the records once they were introduced and have not shown that they needed more time. In addition, although the records were incomplete, the discovery rules require the government only to turn over those records actually in its possession, Fed. R. Crim. P. 16(a)(1)(C), and here the government did so.

IV. *Intervention of Trial Judge*

Defendants contend that the trial judge participated in the trial in a manner favoring the prosecution, thereby denying them a fair trial. They note that, on several occasions, the court asked questions of witnesses and cut off defense counsel's questioning. In addition, defendants point to several comments of the trial judge that they contend displayed to the jury a bias toward the government. For example, the following colloquy occurred during the testimony of Jeri Glynn, an officer of one of the victim leasing companies:

> Q. But you would say that verifying the equipment in that fashion would be a good business practice?
>
> A. Definitely.
>
> Q. Okay. And you're sorry you didn't do it this time?

A. Yes.

Q. Okay.

The Court: You don't get bilked because you're smart.

Record XIV at 198-99. In addition, defendants point to statements made by the trial judge during the testimony of Jolana Ward, one of Cannon's ex-girlfriends:

Q. Okay. Did you ever lose custody of the children?

A. No. David—

The Court: Excuse me. What's the relevance of all this?

Mr. Brown (counsel for the government): I'm going to object to the relevancy of this, your honor.

Mr. Ervin: Your honor, there's going to be extensive testimony about her living with Sterling Russell, and so on, taking the children with her. I'd just like to clear all this up now.

Mr. Brown: What relevance does this have?

The Court: Just a minute, counsel. I'll handle this. You'll win if you just be quiet.

Mr. Brown: All right.

The Court: I don't see any relevance on custody of the children in this case. Let's not try a divorce case. Let's try this case.

Record XVI at 710-11.

[3, 4] Federal judges have wide discretion with respect to the tone and tempo of proceedings before them; they are "not mere moderators or hosts at a symposium." *United States v. Perez,* 651 F.2d 268, 271 (5th Cir. 1981). We have fully described this role of the trial

judge in *Moore v. United States,* 598 F.2d 439, 442 (5th Cir. 1979) (footnotes omitted):

> [t]he trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution. On the other hand, a federal judge is not a mere moderator of proceedings. He is a common law judge having that authority historically exercised by judges in the common law process. He may comment on the evidence, may question witnesses and elicit facts not yet adduced or clarify those previously presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion. Only when the judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial.

Moreover, even if the trial judge does commit error in such a respect, the complaining party must prove that the error was substantial and that it prejudiced his case. *Ruiz v. Estelle,* 679 F.2d 1115, 1129 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed. 2d 795 (1983).

[5] Our review of the record reveals that the trial judge's questioning of witnesses and interruption of counsel did not demonstrate a bias toward the prosecution. The questions "sought only to clarify a witness's testimony," and the trial judge legitimately interrupted counsel's questioning when necessary to expedite the proceedings. *United States v. Borchardt,* 698 F.2d 697, 700 (5th Cir. 1983). The judge's conduct here did not deny defendants a fair trial.

[6] We are more troubled by the court's "bilked" comment and the statement that counsel for the govern-

ment would win if he kept quiet. These statements could suggest to the jury that the court believed that the defendants "bilked" the leasing companies. Nevertheless, while the court erred in making these comments, defendants have not demonstrated that the errors were substantial and that they prejudiced their case. These statements were isolated in nature; the remainder of the lengthy trial was conducted in a fair and unbiased manner. Moreover, these two statements alone did not create a risk that the jury would fail to conscientiously "find the facts, apply the law, and reach a fair verdict," nor did it create a risk that the public would not perceive that trial "as a fair adjudication of guilt or innocence, presided over by a neutral magistrate." *Daye v. Attorney General of the State of New York,* 712 F.2d 1566, 1571-72 (2d Cir. 1983), *cert. denied,* ____U.S.____, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984). Finally, the judge specifically instructed the jury that any comments he made were not intended to favor one side over another. *See Borchardt,* 698 F.2d at 700. Thus, while we disapprove of the trial court's conduct in the respects noted, we hold that defendants were not denied a fair trial by it.

V. *Jury Instructions*

A. Good faith.

[7] Defendants argue that the district court erred in failing to give an instruction on good faith, a complete defense to a mail fraud charge. *United States v. Goss,* 650 F.2d 1336, 1344-45 (5th Cir. 1981). None of the defendants, however, objected to the omission of a good faith instruction at the end of the court's charge. Counsel objected to the omission of certain other instructions,

and objected in general to the trial court's failure to adopt the submitted written instructions. Such a general objection does not meet the requirements of Rule 30, Fed. R. Crim. P., in that it does not distinctly state the matter to which defendants object nor the grounds of their objection. *United States v. Bey,* 667 F.2d 7, 10 (5th Cir. 1982). Nevertheless, we will still consider the objection under Rule 52(b), Fed. R. Crim. P., if it constitutes plain error, that is, error "so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice." *United States v. Howton,* 688 F.2d 272, 278 (5th Cir. 1982).

[8] Defendants have not demonstrated plain error. First, Hawkins and Cannon did receive good faith instructions. While the instructions did not contain the particular wording requested by them, *see United States v. Harrelson,* 705 F.2d 733, 737 (5th Cir. 1983), the charge accurately presented the good faith issue and was not, as alleged by defendants, limited to requiring specific intent to defraud, *Goss,* 650 F.2d at 1345.

[9] Second, although the Adkins brothers did not receive a good faith instruction, it is questionable whether the evidence presented at trial established an evidentiary foundation for the defense. *See United States v. Wehling,* 676 F.2d 1053, 1057 (5th Cir. 1982). Under such circumstances, we cannot say that the failure of the trial court to give a good faith instruction *sua sponte* for the Adkins seriously affected the "fairness, integrity or public reputation" of the proceedings. The failure to give the instruction was not plain error.

B. Timing of the fraud.

[10] Hawkins also argues that the court failed to instruct the jury that he could not be found guilty if he participated only after the scheme took place and if such participation was not in furtherance of the scheme. After the charge was read, counsel for Hawkins objected to the failure to give these instructions.

The court did instruct the jury, however, that Hawkins could be convicted on a particular count only if he was "involved in the plan or scheme at the time of the mailing on a particular count." Record XX at 1458. In addition, the jury was instructed that the government had to prove that the mailings were "for the purpose of executing the scheme to defraud." Record XX at 1444. These encompass Hawkins' proposed instructions, and thus the court did not err.

VI *Sufficiency of the Evidence*

[11] In determining the sufficiency of the evidence, we must view the evidence and all reasonable inferences which may be drawn from it in the light most favorable to the government. *United States v. Shaw,* 701 F.2d 367, 392 (5th Cir. 1983), *cert. denied,* ____U.S.____, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1974) We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* This standard of review remains the same whether the evidence is direct or circumstantial. *Id.* at 394.

A. Alan Perlman.

Glen Adkins maintains that the evidence was not sufficient to show that it was he who posed as "Alan

Perlman," the Southwestern representative who dealt with many of the leasing companies. Jolana W[illegible]d testified, however, that she heard Glen Adkins identify himself in a telephone conversation as "Alan Perlman." The jury was certainly entitled to credit this testimony. *United States v. Mack,* 695 F.2d 820, 822 (5th Cir. 1983). Moreover, her testimony was corroborated by the testimony of Burkett and O'Leary that Glen Adkins and his brother operated (and indeed were the only employees of) Southwestern.

B. Glen and Tom Adkins.

The Adkins brothers argue that the evidence was not sufficient to show that they defrauded the leasing companies. We disagree. Ward and O'Leary testified that the Adkins owned Southwestern, and clearly the jury could infer from the testimony of the learing companies that those companies had been defrauded by Southwestern. Susan Moore, another of Cannon's exgirlfriends, testified that Cannon had told her that the Adkins were defrauding leasing companies. Ward testified that she saw Tom Adkins give large amounts of cash to Cannon on two occasions. O'Leary stated that the description of Southwestern's facilities in the Dun & Bradstreet report was inaccurate. This evidence clearly supports the jury's conviction of the Adkins for mail fraud.

C. Hawkins.

Hawkins challenges the sufficiency of the evidence to show his intent to defraud. The testimony of Jolana Ward demonstrates the requisite fraudulent intent. Ward testified that in the spring of 1981, before Hawkins alleged he knew about Powerguard, Cannon told her that he in-

tended to sell the business to "the Hawk," a nickname that the jury could reasonably have inferred to mean Hawkins. She further testified that in May 1981, when she and Cannon picked up Hawkins at the airport, Cannon agreed to pay $1000 a week to Hawkins to "fade the heat" from the leasing companies. Moreover, she bought several cashier's checks for Cannon that were made out to Hawkins. Hawkins claims that we should not credit Ward's testimony. The jury, however, is the ultimate judge of the credibility of witnesses. *Mack,* 695 F.2d at 822. We will view testimony as incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *Id.* Ward's testsimony is not of such a nature.

Moreover, Ward's testimony is not the only evidence of Hawkins' guilt. Hawkins claims that he legitimately purchased Powerguard for $265,000, yet there are no financial records evidencing the transaction and he spent only a few hours inspecting Powerguard's business records and inventory. We find the evidence in the record adequate for the jury to have concluded that Hawkins' guilt was established beyond reasonable doubt.

Hawkins also argues that the mailings he sent—letters informing leasing companies that he had purchased Powerguard and was moving the company to California—were not in furtherance of the fraudulent scheme. Mailings "designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect" are mailings in furtherance of the fraudulent scheme. *United States v. Ashdown,* 509 F.2d 793, 800 (5th Cir.), *cert. denied,* 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975). Hawkins' mailings fall within this

"lulling" category Nor does the failure of the letters actually to lull the leasing companies relieve Hawkins of criminal liability. *United States v. Hewes,* 729 F.2d 1302, 1321 (11th Cir. 1984).

Consequently, finding no merit in defendants' contentions, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX "B"

CONSTITUTION

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RULES OF EVIDENCE

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant

A "declarant" is a person who makes a statement.

(c) Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay

A statement is not hearsay if—

(1) Prior statement by witness

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the state-

ment, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent

The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1938; Pub. L. 94-113, § 1, Oct. 16, 1975, 89 Stat. 576.)

Rule 901. Requirement of Authentication or Identification

(a) General provision

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge

Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting

Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness

Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like

Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations

Telephone conversations, by evidence that a call was made to the number assigned at the time by the

telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports

Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation

Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system

Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule

Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1943.)

APPENDIX "C"

PORTIONS OF TRANSCRIPT

PEYTON—DIRECT

* * *

6-E—Excuse me, Government's 6-C, 6-D and 6-E.

Mr. Dewitt: Your Honor, could I see what those are, briefly?

The Court: All right.

These are also records of the leasing company?

Mr. Brown: That is correct, Your Honor.

The Court: Is that right, sir?

The witness: Yes, sir.

The Court: All right.

Mr. Dewitt: All right. I have no objection.

The Court: They will be admitted into evidence.

Q. (By Mr. Brown) I show you Government's Exhibit 6 Double-E. Can you identify that exhibit?

A. Yes. This is a report on Southwestern Equipment Manufacturing Company put out by Dunn & Bradstreet which we obtained Ferbuary 18, '81.

Q. Is that the format that it comes off of your machine?

A. Yes, it is.

Q. And is this the Dunn & Bradstreet that you relied upon in your—or part, or one of the things that you relied upon in your credit decision with respect to Southwestern Equipment and Manufacturing Company?

A. Yes. We relied on this report which indicated to us that they were a stable company; had been in the business since 1979—

Mr. Dewitt: Your Honor, I object to him reading from the report.

Mr. Brown: Let me—yes.
I would offer into evidence Government's exhibit—

Mr. Dewitt: Your Honor, I have an objection which I'd like to make outside of the presence of the jury because the witness has to be taken on voir dire.

The Court: No. I deny your motion and you can do that—wait a minute.

Is this also your company record?

The Witness: Yes.

Mr. Dewitt: Your Honor, I think what he's saying is it's records from Dunn & Bradstreet, which as far as I'm able to determine—

The Court: No. He says that record is compiled there at his company. That's what I thought.

Mr. Garens: Your Honor, beg your pardon. I believe he's saying that the Dunn & Bradstreet record was found at his company. His company officers did not prepare the Dunn & Bradstreet document.

The Court: I thought it was something that was prepared at the company.

The Witness: No. The information in the report comes from Dunn & Bradstreet. It is printed out on our printer. It is a printed report.

The Court: It's printed at your company by your printer?

The Witness: Yes, sir.

The Court: It's your report, but you—but it is information you receive from someone?

The Witness: We pay for the report, yes.

The Court: All right. I'll admit it into evidence.

Mr. Dewitt: Your Honor, to make my objection clear, the contents of it is not something of which he has custody. The information came, from what I understand, from Dunn & Bradstreet.

The Court: All the information these people give come from someone else.

Mr. Dewitt: The information he's sponsoring is coming from other than Powerguard or Southwest or Electronic Marketing Concepts. And he's stating that he dealt with these people and these are defendants in the case, but this is hearsay as to these defendants.

The Court: I'll overrule the objection.

Q. (by Mr. Brown) and Government's 6-F, what is that?

A. This is a report we obtained off the same printer of Powerguard of Texas, Incorporated.

Q. This printer is located in your office, is it not?

A. Yes, it is.

Q. And you maintain it in your records and rely on it in making your decision whether or not to give credit to Powerguard of Texas?

A. Yes, this is one of the documents.

Mr. Brown: Offer Government's 6-F.

Mr. Dewitt: Same objection.

The Court: I understand. I'll admit it into evidence.

Q. (By Mr. Brown) Now, specifically, when you reviewed this Dunn & Bradstreet report with respect to Southwestern Manuufacturing Equipment Company, can you tell us what you relied—by the way, have you reviewed few or many of these particular reports?

A. Several.

Q. Is that part of your job there at Misco, one of your many functions?

A. Yes. Well, when you look at one of these, at least when I do, there's certain items that I would key in on to try to gather an opinion out of the report: having been in business, from this report, since '75; the trade history is prompt; that they pay their bills. The

* * *

Q. And what rent did you charge them for it?

A. That was—it varied during the term of the lease. It started, I think, at $375 a month, and went up to $400, and then at the time they left, it was up to $536.50 per month.

The Court: Excuse me. When was the first conversation that you had with these gentlemen about the lease? I diidn't get that date.

The Witness: The first conversation that I had with them was on May 15, 1980.

The Court: All right, sir. Go ahead.

Q. (By Mr. Brown) May 15th, 1980?

A. Yes.

Q. And how long did they lease these premises from you?

A. They leased the premises on a one year lease from June 1st, 1980 to May 31st, '81. They then entered into a three-year extension from June 1, '81, to May 31, 1984. So that lease is still in effect.

Q. And did they continue to stay in that premises and pay you the rent as contracted for?

A. No. They stayed for two years and then it's the last I saw of them until today.

Q. All right. Tell me the circumstances of your termination of the lease or their leaving the property.

A. Well, we suddenly became aware that they weren't there anymore.

Q. When was this?

A. This was somewhere around May, 1982.

Q. And when they left in May of 1982, did they leave anything behind?

A. Yes, they did.

Q. What was that?

A. They left a few desks, two or three desks, and a couple of chairs and a couple of adding machines and a safe.

Q. Did they leave a telephone?

A. And a telephone was still operating.

Q. Was it still operating? How did you know that?

A. When I went into the space, I picked up the telephone and it had a dial tone. Also, I tried to contact them by telephone, so I dialed that number from my own office, and the telephone was operative. It was picked up by an answering service.

Q. So they took off and left an answering service there at that telephone?

A. That's correct.

Mr. Brown: May I approach the witness, Your Honor?

The Court: Yes, sir.

Q. (By Mr. Brown) I show you what's been marked into evidence as Government's Exhibit 6 Double E, which is a Dunn & Bradstreet report.

By the way, did they lease this in the name of . . .

* * *

APPENDIX "D"

O'LEARY—DIRECT

The Court: Thank you very much. Call your next witness.

Mr. Brown: Mr. Arthur O'Leary.

This witness has not been sworn, Your Honor. He just arrived about fifteen minutes ago.

The Court: All right.

Arthur F. O'Leary, Government's witness, sworn.

DIRECT EXAMINATION

By Mr. Brown:

Q. Would you state your name, sir, and where you reside.

A. Yes. My name is Arthur F. O'Leary, and I live in Los Angeles.

Q. What do you do there, sir?

A. I'm an architect.

Q. Do you know a Tom Adkins?

A. Yes, I do.

Q. Is he in the courtroom today?

A. Yes.

Q. Could you point him out, please?

A. Yes, sir. He's sitting right there with the glasses in the light coat.

Mr. Brown: May the record reflect the witness has identified the defendant Tom Adkins.

Q. Do you know Glen Adkins?

A. He's sitting across the table with the mustache.

Mr. Brown: May the record reflect the witness has identified the defendant, Glen Adkins.

The Court: All right, sir.

Q. (By Mr. Brown) Mr. O'Leary, how did you happen to first meet these two individuals?

A. My partners and I own a small office building, and they approached us to rent space as a tenant in the building.

Q. And where is that building located?

A. 6118 Venice Boulevard, Los Angeles, California.

Q. All right. And when they approached you to rent this space, what did they tell you about what they were going to use it for?

A. They told me that they were going to use it for the office of the Southwest Manufacturing Equipment Company.

Q. And did they tell you what sort of business they did?

A. Yes.

Q. What was that?

A. They said they were in the manufacturing of equipment for commercial tensions, as in restaurants.

Q. What size space is this? Did you eventually lease them this space?

A. Yes.

Q. What size space is it?

A. It's a little over 500 square feet.

* * *

Southwestern Manufacturing Equipment Company?

A. Yes.

Q. Okay. Let me show you Government's Exhibit 6 Double E. At the bottom of this exhibit is a paragraph reading: "Operation. Employees: 12 including officers." Did you ever observe twelve people including officers in that location?

Mr. Dewitt: Your Honor, I object to the use of the Dunn & Bradstreet report—

The Court: You're objecting to the use. I don't know what he's using.

Mr. Dewitt: It appears to be—

Mr. Brown: This is Government's Exhibit 6 Double E, Judge, which is a Dunn & Bradstreet report.

The Court: It's already been admitted.

Mr. Brown: It's in evidence.

The Court: It's already been admitted. You already objected to it.

Mr. Dewitt: Yes, sir.

The Witness: No, the only people that I ever saw was the two Adkins brothers. I hadn't—I don't think I ever saw anybody else on the premises.

Q. (By Mr. Brown)

"Facilities: Lease premises, 2500 square feet on first floor of two story concrete building in normal condition."

Does that describe the 25 hunded square foot office that they had there at that location?

A. No.

Q. Would that be an incorrect statement on the Dunn & Bradstreet report?

A. Well, it would unless there's some other office.

Q. I refer you to the top of the page, Southwestern Manufacturing and Equipment Company, 6118 Venice, Number 102.

Would that be that office?

A. That is the address. That is not a brick building, either. It's a frame and stucco building.

Q. What sort of neighborhood is it in?

A. It's in an average neighborhood and it's right next to the freeway. It's a freeway access-type building.

Q. Do you know Allister Williamson?

A. No, I do not.

Mr. Brown: If I may approach the witness again, Your Honor.

Q. (By Mr. Brown) At the top of this Dunn & Bradstreet report, furniture and fixures worth $1,054,127. Would that describe what you found in that 500 square foot office when they left?

A. No.

Q. Is this the—sir, I see you brought your folder with you. Is this—

A. This is a sketch of the building and it shows the floor plan of the two floors.

Mr. Brown: Judge, this witness just came in, just got off an airplane. I haven't had a chance to mark any of these exhibits or anything. If you'll indulge me.

The Court: That's all right. If you want to mark the exhibits, go ahead.

Mr. Brown: All right, sir.

Q. (By Mr. Brown) So I can be clear, sir, what part of that sketch is the 500 square foot office that they rented?

A. Actually, what this is is an exhibit out of the lease, and the lease—the space that was occupied was on the first floor, Suite 102, and it's in the front of the building.

Q. That would be the shaded area here?

A. Yes.

Mr. Brown: I'd like to offer this into evidence, Your Honor, as Government's Exhibit Number 15.

The Court: All right. I'll admit it into evidence.

Q. (By Mr. Brown) Did any of these individuals ever identify themselves to you as Alan Perlman?

A. No.

Q. Have you—how much did they leave currently owing you on that lease?

A. At the time they—well, the lease is still in effect.

Mr. Barens: I object to that, Your Honor. I don't see any relevancy of the outstanding rental owed to this gentleman. It has nothing to do with the accounts before this court to be adjudicated.

The Court: For what purpose do you tender that evidence?

Mr. Brown: Your Honor, they submitted a Dunn & Bradstreet report showing—

The Court: There's no evidence that they submitted that report. That's just evidence that that's the Dunn & Bradstreet report.

Mr. Brown: In the name of Southwestern Manufacturing Equipment Company.

The Court: So what? How do we know where they got their information?

Mr. Brown: Well, Your Honor, I'm just going to show that this is consistent with what he's telling us, that it's the same address on the Dunn & Bradstreet report.

The Court: But what's that got to do with how much rent they owe?

Mr. Brown: I'll withdraw the question.

The Court: Why did you ask it and waste all my time, to start with, and all this jury's time and everybody else's?

* * *

APPENDIX "E"

* * *

that in any way to run a business? You see giant checks for cash, $25,000 checks for cash. You'll see $30,000 checks for cash. Constant. And they correspond to the checks from the leasing companies.

They had lots of cash. I submit to you, ladies and gentlemen, they would take those—they would get the check from the leasing company. They'd call Walter Cannon, say, Walter, we got the check, U.S. Leasing.

Walter hops on the airplane, sometimes brings Jolana with him, sometimes doesn't. They go out there. They split the cash, they split the money from their scam of the leasing companies.

Tom and Glen Adkins. Evidence against Tom and Glen Adkins is clear. Tom and Glen Adkins are Southwest Manufacturing Equipment Company.

O'Leary from Los Angeles said he rented them the office, a little 500 square foot office there and it was rented to Tom and Glen Adkins. They said they were going to manufacture kitchen equipment. See if you can see anything on this ledger anywhere about kitchen equipment, buying any kind of kitchen equipment. He rented them a 500 square foot building.

If you look at the Dunn & Bradstreet report, it's going to tell you a bunch of really false information about their office lease premises facility. 2500 square feet on the first floor of a two-story, concrete building in normal condition. Fixed facilities over a million dollars. O'Leary's eye-

balls almost fell out of his head when I pointed that out to him.

They done it up in Dunn & Bradstreet report. They falsified information about Southwestern. They sent out all these—all these—all of these invoices with Southwestern on them. They answered—Glen answered the phone as Alan Perlman, they used the name Alan Perlman. They were Southwestern Manufacturing. They visited with Walter Cannon.

Susan Moore saw Tommy in town. Jolana Ward saw them out there three or four times. She calls him Tommy. She knows him. They're not just friends.

And don't you know, as an aside, ladies and gentlemen, if she wanted to make the story good, if she really wanted to drop Cannon in the grease because she hated him and wanted to lie about it, she'd say, I went to the office all the time. I saw him count cash every single time.

She didn't tell you that. She told you the time that she was there. And you can weigh that in considering whether or not she's telling the truth. She was there twice. She saw him count the cash twice. The rest of the time she stayed out there at Tommy's apartment. She slept in while they went out to the office.